SUPREME COURT STATE OF WASHINGTON

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SUPREME COURT OF THE STATE OF WASHINGTON

KATHLEEN HARDEE,

Petitioner,

٧.

STATE OF WASHINGTON DEPARTMENT OF EARL LEARNING,

Respondent.

AMICI CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, AND THE NATIONAL EMPLOYMENT LAW PROJECT

Lenora M. Lapidus **COUT**Ariela M. Migdal **COUT**Risha K. Foulkes **COSUT**American Civil Liberties Union
Foundation – Women's Rights
Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 519-7861

Sarah A. Dunne, WSBA #34869 Nancy L. Talner, WSBA #11196 American Civil Liberties Union of Washington Foundation 901 Fifth Avenue, Suite 630 Seattle, WA 98164 (206) 624-2184

Attorneys for Amici Curiae

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I. <u>ISSUE ADDRESSED BY AMICI CURIAE</u>

Are childcare providers entitled to the same level of due process protection for revocation of their licenses as doctors, registered nursing assistants, and other professionals, given that license revocation stigmatizes providers, who are primarily women, and limits their employment opportunities?

II. <u>IDENTITY AND INTEREST OF AMICI CURIAE</u>

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Through its Women's Rights Project, founded in 1972 by Ruth Bader Ginsburg, the ACLU litigates cases concerning gender equality, both as direct counsel and as amicus curiae. The ACLU of Washington is the local affiliate of the ACLU in the State of Washington and has more than 20,000 members dedicated to the preservation of civil liberties and civil rights. The ACLU and the ACLU of Washington engage in litigation and advocacy aimed at ensuring workforce equality for women and reducing barriers for people whose background records unfairly exclude them from employment. The

ACLU of Washington has appeared before this court as direct or *amicus* counsel on numerous occasions. *See*, *e.g.*, *State v. Nason*, 168 Wn.2d 936, 233 P.3d 848 (2010). The ACLU Women's Rights Project and the ACLU of Washington have been accepted jointly as *amici* before Washington's appellate courts. *See Indigo Real Estate Services v. Rousey*, 151 Wn.App. 941, 215 P.3d 977 (2009). *Amici* have a strong interest in ensuring that workers in professions traditionally dominated by women, such as childcare, receive fair and equal treatment under the law and that the law does not impose barriers to their employment without adequate due process.

The National Employment Law Project ("NELP") is a non-profit legal organization with over 40 years of experience advocating for the employment and labor rights of low-wage workers, unemployed workers and workers with a criminal record. NELP's areas of expertise include the workplace rights of low-wage workers, and NELP provides technical and legal assistance to policy groups, federal and state legislators, community worker organizations, and unions. NELP has litigated and participated as amicus in numerous cases addressing the rights of low-wage workers.

NELP works to ensure that all workers receive basic workplace protections and are afforded the same opportunities for employment, including workers in household-based occupations with a largely female

workforce, such as childcare. Childcare workers provide invaluable labor to millions of American families but often face severe barriers in protecting their employment rights, creating uncertainty for both the children for whom they care and for their own families, who rely on their income. A decision of this Court in favor of the State of Washington will directly undermine NELP's and its constituents' goal of securing fair and equal treatment and adequate due process for all workers.

III. STATEMENT OF THE CASE

Petitioner Kathleen Hardee made her living as an in-home childcare provider for 23 years until her license was revoked by the State. Supp. Br. of Petitioner at 1. The State revoked Petitioner's license based on the preponderance of the evidence standard, which the Court of Appeals upheld. Hardee v. Dep't of Soc. and Health Servs. et al., 152 Wn.App. 48, 56-57, 215 P.3d 214 (2009), review granted, 168 Wn.2d 1006 (2010). The court rejected Petitioner's argument that, because significant liberty and property interests were at stake, she had a due process right to the more demanding "clear and convincing" evidence standard to which other licensed professionals, such as doctors and registered nursing assistants, are entitled. Id.; see also Supp. Br. of Petitioner at 5-13; Op. Br. of Appellant at 29-32 (discussing Petitioner's

due process rights under U.S. Const. amend. V and XIV and Wash. Const. Art. 1, § 3, and cases interpreting those provisions).

The Court of Appeals distinguished childcare from work performed by doctors and registered nursing assistants on two bases. First, the court found that licenses for doctors and nursing assistants relate to particular individuals, whereas Petitioner's license was "in the nature of a site license." *Hardee*, 152 Wn.App. at 56-57. Second, the court found that a childcare license is "more in the nature of an occupational license than a professional license" and that only licenses requiring graduation and qualifying examinations are professional licenses. *Id.* The court therefore likened the revocation of a childcare license to the suspension of an erotic dancer's license. *Id.*

IV. ARGUMENT

1. Summary of Argument

Amici address two reasons that this Court should reverse the holding of the Court of Appeals. First, the Court of Appeals did not consider the significant consequences that the State imposes on childcare providers whose licenses are revoked. These consequences are, in many respects, similar to those imposed on people with criminal records, and they may prevent individuals from working in numerous professions, especially those that childcare providers would be most qualified to enter.

Due to the prevalence of background checks and screening by employers, license revocation may subject an individual to long-term, if not life-long, employment barriers. The standard of evidence in license revocation hearings is therefore of critical importance in ensuring fair treatment of childcare workers facing State deprivation of liberty and property interests.

Second, affording less due process to workers in a female-dominated field reflects and perpetuates gender-based stereotypes about the value of childcare work. Caring for children historically has been and remains primarily "women's work" that is low-paying and lacking in adequate legal protections. The Court of Appeals failed to consider the qualifications of childcare providers and the professionalized nature of this field and erred in denying the higher due process standard for women in this State-licensed profession.

Amici's two points support the due process arguments made by Petitioner and other amici. As Petitioner and other amici have demonstrated, the Court of Appeals erred in holding that only licenses requiring graduation and qualifying examinations merit the higher standard of proof afforded to doctors and registered nursing assistants. The Court of Appeals' due process analysis contradicts this Court's previous holding that nursing assistants — who are not required to undergo training, education, or examinations — should receive the higher

standard of proof. Ongom v. Dep't of Health, 159 Wn.2d 132, 139-140, 148 P.3d 1029 (2006), cert. denied, 127 S.Ct. 2115 (2007).

Petitioner and other *amici* have further demonstrated that the Court of Appeals erred in holding that the licenses of childcare providers are not professional licenses, but rather, site-specific, occupational licenses. This Court has indicated that the analysis of the standard of proof for license revocation should not focus on the site or professional nature of the license, but on the impact the revocation will have on the licensee. *Id.*; *Nguyen v. State of Wash.*, *Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 522, 29 P.3d 689 (2001), *cert. denied*, 122 S. Ct. 1203 (2002). The instant brief is intended to give the Court additional information and context regarding that impact.

- 2. License Revocation is a State Action that Creates
 Barriers for Childcare Providers Seeking Employment
 in Washington and Other States
- A. A childcare license is not a mere site-specific license, but applies to the individual licensee.

The Court of Appeals erred in holding that childcare providers are not entitled to the same standard of proof for license revocation as other licensed professionals, including doctors and registered nursing assistants. The court found that a childcare license is a site-specific, occupational license, as opposed to a professional license. *Hardee*, 152 Wn. App. at

56-57. However, the court failed to consider that the revocation of a childcare license stigmatizes a provider and precludes her from many future employment opportunities.

Washington regulations make clear that a license is granted to the childcare provider to whom it is issued for the caregiving services provided in the facility. The license is not a mere transferrable site license for personnel or equipment that can be used by anyone seeking to operate a facility in that location. RCW 43.215.205 (stating that a license application is based, among other criteria, on the licensee's "provision of necessary care and early learning...") (emphasis added); WAC 170-296-0020 (stating that a license certifies that "you have been granted permission to operate a family home child care...") (emphasis added); RCW 43.215.260 (stating that the license "is not transferable and applies only to the licensee and the location stated in the application") (emphasis added).

The proper standard for evaluating the standard of proof for a license revocation is not whether it is a site license, but rather, the impact the revocation will have on the licensee. *Ongom*, 159 Wn.2d at 139-40; *Nguyen*, 144 Wash.2d at 522. In the case of childcare licenses, the negative consequences that flow from license revocation attach not only to the site at which childcare is provided, but to the person holding the

license. See infra Section 2.B (detailing the consequences of license revocation). A childcare license — and, by extension, the revocation of the license — is, therefore, not merely site-specific, but rather is inherently and permanently linked to the individual provider's professional reputation and ability to work in numerous fields in the future.

B. Revocation of a childcare license entails severe Stateimposed consequences justifying the clear and convincing standard of proof.

This Court has found that the revocation of a professional license entails "quasi-criminal" proceedings that are entitled to due process protections under the U.S. Constitution. *In re Matter of Johnston*, 99 Wn.2d 466, 474, 663 P.2d 457 (1983). Accordingly, this Court requires the clear and convincing standard of proof in a license revocation proceeding when both a property interest (a professional license) and a liberty interest (the right to earn a living) are at stake and the consequences for the licensee are severe. *Nguyen*, 144 Wn.2d at 522-24 (citing with approval *Painter v. Abels*, 998 P.2d 931 (Wyo. 2000), which struck down as a violation of state and federal due process provisions a statute allowing a doctor's license to be revoked based on the preponderance of evidence standard).

The consequences of revoking a childcare license are severe.

Revocation of a childcare license is a permanent mark on a provider's

record that creates barriers to working in the field of childcare and in many other fields, both in and beyond Washington State. Across the country, background checks have become a routine part of the application process in many fields of employment. More than 80 percent of large employers now conduct background checks, and many employers refuse to hire applicants without a clean record, even if they are legally permitted to do so. National Employment Law Project, Criminal Background Checks 1 (2006), available at http://www.nelp.org/page/-/SCLP/union%203-pager_122106_150337.pdf.

The State itself is responsible for mandating these background checks in many cases. Washington requires employers in a number of professions involving work with children or vulnerable adults to conduct background checks and to consider civil adjudications (including childcare license revocation). RCW 43.43.832(4). It is not only State employers that consider license revocations, but also agencies and facilities licensed by the State and contractors with the State. *Id.*

The Department of Early Learning (DEL) must conduct background checks of any applicant for a position in the field of childcare and must consider license revocations. RCW 43.43.832(5) & (6). The list of offenses covered by DEL reporting includes not only crimes, but also "negative actions," and a childcare license revocation is defined by the

State as a "negative action." WAC 170-06-0070; 170-06-0020. Future employers are encouraged by the State to consider that a childcare license revocation is a "negative action" implicating an applicant's "character." WAC 170-06-0020. If a childcare provider's license has been revoked, DEL is required to notify public and private childcare resources and referral agencies. RCW 43.215.300. Information on license revocations is also easily accessible to the public over the Internet. RCW 43.215.370. In addition to this notification to potential future employers that a license revocation is considered by the State to be a "negative action," a childcare provider may be denied a new childcare license based upon revocation of a previous license. WAC 170-295-0100.

If a childcare provider seeks employment in other fields that entail work with populations the state has identified as "vulnerable," including those involving contact with children and disabled adults, she is required to undergo a background check conducted by the Department of Social and Health Services (DSHS). The offenses covered by DSHS reporting extend beyond crimes and include "negative actions," such as license revocation. DSHS Secretary List of Crimes and Negative Actions, available at

http://www.dshs.wa.gov/pdf/ca/CAListCrimeNegativeActions.pdf. The DSHS Background Check Central Unit classifies a childcare license

revocation as a "civil adjudication proceeding," because it is an administrative finding of violation of a professional licensing standard regarding a child. RCW 43.43.830; WAC 388-06-0020. Both this definition and the "negative action" label stigmatize an individual whose background check is processed for a job application.

A variety of public- and private-sector jobs require such background checks in Washington State, including nursing, in-home Medicaid care, mental health services, care for persons with physical and developmental disabilities, and work in schools. RCW 18.52C.040; RCW 74.39A.050; RCW 72.23.035; RCW 74.18.123; RCW 74.15.030. The barriers to working in these professions are particularly detrimental to childcare providers; providers' caregiving expertise would make these jobs in the human services field among the most likely choices for future employment, and the low income level of most providers makes it especially difficult for them to retrain for unrelated fields of work.

These barriers to employment in childcare and related human service professions are likely to be present in other states. In at least eight states besides Washington, there are a number of human services jobs — particularly in childcare and nursing — for which information on an applicant's out-of state license revocation may be revealed in a background check. A.A.C. § R9-5-209; Cal. Health & Saf. Code §

1338.5; HRS § 457-9; 210 ILCS 55/8; Miss. Code Ann. § 43-11-13; Nev. Rev. Stat. Ann. § 632.320 & § 654.190; N.J. Stat. § 45:11-26; Tex. Hum. Res. Code § 42.059.

Moreover, Washington's laws on business licenses deem any prior revocation of a professional or business license "unprofessional conduct" that can be used to deny a myriad of licenses and certificates needed for many kinds of work in Washington beyond the human services fields. RCW 18.235.130.

Subjecting childcare providers to life-long employment barriers in a range of fields without clear and convincing evidence after they have invested decades of time and skill development in a state-licensed profession is no less a deprivation of due process than revoking the license of a doctor or a registered nursing assistant without meeting this standard of proof. The State's interest in protecting the safety of children is significant, as is its interest in protecting the safety of vulnerable patients against misconduct by health care professionals. Indeed, under *Nguyen* and *Ongom*, the clear and convincing standard applies to license revocations for doctors and nursing assistants who care for children as well as those who care for adults. However, this Court properly recognized in *Ongom* and *Nguyen* that the standard of proof in a license revocation proceeding for health care professionals is not determined

solely by the importance of the State's interests, but by the severity of the consequences for the individual licensee. *Ongom*, 159 Wn.2d at 139-40; *Nguyen*, 144 Wn.2d at 522. A higher standard of proof is warranted when the licensee has more than a monetary judgment at stake and will face the stigma of professional discipline and lifelong preclusion from numerous employment opportunities. *Ongom*, 159 Wn.2d at 139-40; *Nguyen*, 144 Wash.2d at 524-525.

By including license revocation as a "negative action" for both DEL and DSHS background checks, the State of Washington requires potential employers in numerous human services fields to consider such license revocations. The stigma that attaches to providers whom the State has marked as potentially untrustworthy is particularly detrimental. By applying only a preponderance of evidence standard of proof to childcare providers in license revocation hearings, the State creates a double bind for these providers, making it relatively easy to revoke their licenses while making it particularly difficult for them to find future employment in childcare and many other fields. The severity of the consequences to the licensee requires application of the clear and convincing standard of proof in childcare license revocation proceedings.

3. The Court of Appeals' Decision Perpetuates the Historical Devaluation of Childcare as "Women's Work" that Does Not Require Legal Protections

A. Childcare historically has been a female-dominated profession without adequate legal protections.

Caregiving jobs traditionally have been and continue to be held predominantly by women, with women of color and women from marginalized immigrant groups disproportionately represented. SCOTT MARTELL, CONFRONTING THE GLOVES-OFF ECONOMY 15 (Annette Bernhardt, et al. eds. 2009), available at http://nelp.3cdn.net/0f16d12cb9c05e6aa4 bvm6i2w2o.pdf; Peggie R. Smith, Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform, 48 Am. U. L. REV. 851, 915-916 (1999); see also Brief for the Urban Justice Center et al. as Amici Curiae Supporting Respondent, Long Island Care at Home, Ltd., et al. v. Coke, 551 U.S. 158, (2007) (No. 06-593). Researchers and historians have documented the ways in which, since the era of slavery in the United States, racism and sexism have shaped the place of caregiving in the workforce and perceptions of its economic value. Smith, Regulating Paid Household Work, supra, at 877-882 (describing historical resistance to the idea of providing labor rights for domestic workers, due to racism towards women of color who performed this work).

Childcare continues to be a profession made up primarily of women; more than 95 percent of childcare workers are women, and a

disproportionate number are women of color. Martell, Confronting the Gloves-Off Economy, *supra*, at 15. Childcare workers account for an estimated 2.3 million jobs nationally, with approximately 650,000 of these workers self-employed as "family childcare providers," including those who, like Petitioner, work out of their own homes. Ctr. For the Child Care Workforce & Human Servs. Policy Ctr., Estimating the Size and Components of the U.S. Child Care Workforce and Caregiving Population 2 (2002), *available at* http://hspc.org/publications/pdf/ccw_May_2002.pdf. Although childcare providers are a growing force in the economy, many work outside of the traditional employer-employee relationship and lack legal protections under the National Labor Relations Act and the Fair Labor Standards Act. National Labor Relations Act, 29 U.S.C. § 152(3) (2006); Fair Labor Standards Act, 29 U.S.C. § 203(e)(1) (2006).

B. Childcare is a professionalized field that merits the license protections afforded to doctors and registered nursing assistants.

Other *amici* have underscored the professional nature of childcare work by pointing to the importance that Washington State's Department of Early Learning (DEL) places on continuing education for providers and DEL's own practice of referring to providers as "professionals." *Brief for Northwest Justice Project as Amici Curiae Supporting Petitioner*, 7 (No.

83728-7). In addition, many childcare workers voluntarily join professional organizations, such as the National Child Care Association, to further their skills and knowledge in the field. See http://www.nccanet.org/. Childcare workers may earn nationallyrecognized professional credentials, such as the Child Development Associate (CDA) credential from the Council for Professional Recognition or the Child Care Professional (CCP) designation from the National Child Care Association. BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK: CHILD CARE WORKERS, 2010-11 ed., available at http://www.bls.gov/oco/ocos170.htm. Although the Court dismissed Petitioner's licensing requirements as "20 clock hours of basic training," a Washington State childcare provider can also fulfill the licensing requirement with more extensive training that includes: a CDA credential; 12 or more college quarters of credits in early childhood education or child development; or an Associate degree or higher degree in early childhood education, child development, school age care, elementary education or special education. WAC 170-296-1410(5)(d).

Survey data reveal that providers themselves view childcare as a career, rather than as a temporary job. MARCY WHITEBOOK ET AL.,

NATIONAL CHILDCARE STAFFING STUDY, WHO CARES? CHILD CARE

TEACHERS AND THE QUALITY OF CARE IN AMERICA 56 (1989). The facts

concerning childcare workers' training, professional credentials and affiliations, and Washington State's policies on childcare workers are not reflected in the Court of Appeals' decision that childcare is a mere "occupation," rather than a professional career deserving of the same due process protections in license revocation proceedings afforded to registered nursing assistants and doctors.

C. Gender stereotypes have contributed to poor job conditions in childcare and dismissive attitudes about the value of this professionalized field.

The Supreme Court of the United States has recognized the importance of women's economic contributions and the harm of long-held stereotypes that a woman's natural role is that of caregiver. *See Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 737, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (criticizing "stereotype[s] that only women are responsible for family caregiving"). Accordingly, the categorization of certain professions as "women's work" is no longer an acceptable ground for overt discrimination. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982) (overturning a nursing school policy that excluded men, because such policies "perpetuate the stereotyped view of nursing as an exclusively woman's job").

Nonetheless, gender stereotypes remain a pervasive barrier to substantive equality in certain female-dominated professions — especially

where women's workforce participation takes the form of caregiving. This is particularly true for childcare workers. Despite growing public recognition that childcare workers are denied the labor protections they deserve, arcane beliefs about women's natural role as caregivers continue to obscure the importance of women's work and the severe economic consequences they face when they are precluded from employment opportunities. WHITEBOOK ET AL., supra, at 2-3. The idea that women are naturally suited to childcare often causes childcare workers' professional preparation and intensive on-the-job skill development to be overlooked, as motherhood is seen as all that is really needed to prepare workers for this field of work. Id. In fact, childcare work is often perceived as a mere extension of or substitute for the work of mothering one's own children. Id. Researchers have documented the pervasive and deeply-ingrained societal belief that childcare work is performed out of love for children, without a need for job stability or compensation. Peggie R. Smith, Laboring for Child Care: A Consideration of New Approaches to Represent Low-Income Service Workers, 8 U. PA. J. LAB. & EMP. L. 583, 591 (2006).

Depressed wages and lack of job benefits for childcare workers reflect societal attitudes that devalue childcare work. Smith, *Laboring for Child Care*, at 589. Economic research on earning power indicates that

the qualifications and skills of childcare workers should allow them to command higher salaries than the poverty-level wages most providers receive. Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev. 1390, 1397 (2008). This phenomenon has been called a "wage penalty" for childcare work. *Id.* Most childcare providers also lack job benefits such as sick leave, health care, paid vacation, or retirement plans. Whitebook et al., *supra*, at 2-3; Smith, *Publicization of Home-Based Care, supra*, at 1397. In addition, when childcare workers pursue training and educational opportunities beyond what is required by state licensing requirements, they reap lower financial returns on their investments than workers in other sectors of the economy. Smith, *Laboring for Child Care*, *supra*, at 588-89.

Thus, despite possessing qualifications and skills that research has objectively linked to better paying and more stable jobs, society's subjective devaluing of childcare work means that providers must constantly struggle to remain in their chosen vocation. Making it easier for the State to revoke childcare licenses would further erode the already tenuous protections that exist for childcare workers, undermining the investments they have made in their profession.

The opinion of the Court of Appeals not only reinforces the devaluation of childcare jobs, it also reflects stereotypically dismissive

views of such work. The court's opinion dismisses Petitioner's arguments about the standard of evidence in two brief paragraphs, without any meaningful inquiry into the nature of childcare work or the consequences of license revocation for providers. *Hardee*, 152 Wn. App. at 55-57. As outlined above, the investment of childcare providers in their field, the professionalized nature of this work, and the significant negative consequences of license revocation require the higher standard of proof to protect the due process rights of childcare licensees.

V. <u>CONCLUSION</u>

For the foregoing reasons, this Court's constitutional due process rationale for a clear and convincing standard of proof in *Ongom* and *Nguyen* applies equally to the revocation of childcare providers' licenses.

Amici request that the Court reverse the ruling of the Court of Appeals and apply the same standard of evidence to the revocation of licenses for childcare providers.

RESPECTFULLY SUBMITTED this 21st day of September, 2010.

Sarah A. Dunne, WSBA #34896 Nancy L. Talner, WSBA #11196

American Civil Liberties Union of Washington

Foundation

901 Fifth Ave., #630 Seattle, WA 98168

(206) 624-2184

Lenora M. Lapidus*
Ariela M. Migdal*
Risha K. Foulkes*
American Civil Liberties Union Foundation –
Women's Rights Project
125 Broad Street, 18th Floor
New York, NY 10004
(212) 519-7861

*Not admitted in this Court

Attorneys for Amici Curiae